1998

State of Utah v. J.R. Miller : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	DOCKET NO. 981604
Plaintiff/Appellee,	:	Case No. 981604-CA
v.	:	
JONATHAN RAYMOND MILLER,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR THEFT, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-404 (1995), AND THEFT, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-6-404 (1995), IN THE SEVENTH JUDICIAL DISTRICT IN AND FOR GRAND COUNTY, STATE OF UTAH, THE HONORABLE JUDGE LYLE ANDERSON, PRESIDING.

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for auto theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1995), and theft, a class A misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1995), in the Seventh Judicial District Court, in and for Grand County, State of Utah, the Honorable Judge Lyle Anderson, presiding. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Did the trial court properly admit into evidence alleged hearsay testimony? "Whether a statement is offered for the truth of the matter asserted is a question of law, which [an appellate court] review[s] under a correction of error standard." State v. Perez, 924 p.2d 1, 2-3 (1996). However, iIn reviewing a trial court's rulings on

evidence, the appellate court will generally allow the trial court "a good deal of discretion." State v. Pena, 869 P.2d 932, 938 (Utah 1994).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Determinative statutes and rules are attached at Addendum A.

STATEMENT OF THE CASE

Defendant was charged by information with one count of theft of an operable motor vehicle (Count I), a second degree felony, and one count of theft, a class A misdemeanor (Count II) (R. 1-2).[1] Following a jury trial, defendant was found guilty on both counts (R. 100). The trial court sentenced defendant to a statutory one-to-fifteen year term in the Utah State Prison on Count I and a statutory term of one year in the Grand County Jail on Count II, to be served concurrently (R. 107-08).

STATEMENT OF FACTS[2]

Trial Testimony

On the evening of June 11, 1998, Ms. Sylvia Rodriguez arrived in her convertible Geo Tracker automobile at Swayze Rapids Campground, located on the

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[1] Utah Code Ann. § 76-6-412 (Supp. 1998) provides: " (1) Theft of property and services as provided in this chapter shall be punishable (a) as a felony of the second degree if the . . . (ii) property stolen is . . . an operable motor vehicle; [and] (c) as a class A misdemeanor if the value of the property stolen is or exceeds $300 but is less than $1,000[.]"

[2] The facts are recited in the light most favorable to the jury's verdict. See State v. Gordon, 913 P.2d 350, 351 (Utah 1996); State v. Scales, 946 P.2d 377, 379 (Utah App. 1997).

Green River, to prepare for an enjoyable few days of river rafting with friends (R. 119:39-40, 46, 66). There she saw defendant, who had a Geo Metro, walking through a campsite and asked him about the availability of that site. (R. 119:41, 47). Later, as Rodriguez prepared her campsite, defendant approached and assisted Ms. Rodriguez for nearly two hours, during which time Ms. Rodriguez talked about her river trip (R. 119:41-42, 121). In return for his help, Ms. Rodriguez gave defendant a couple of beers (R. 119:43). Later that evening, Ms. Rodriguez asked defendant to watch her campsite while she went into town (R. 119: 43-44). When she returned, defendant was sitting on the picnic table in her campsite, and they conversed (R. 119:44). Ms. Rodriguez's friends arrived later that evening (R. 119:44).

The next day, when Ms. Rodriguez's friends had gone to view the rapids, defendant again came over to talk to her (R. 119:44-45). During their conversation, defendant, who claimed he was from California, mentioned how much he liked convertibles that the Geo Metro in his camping spot was his car (R. 119:47, 49, 64, 80). However, Ms. Rodriguez noticed that the Geo Metro had Florida license plates (R. 119:49). Defendant also said that he had no money (R. 119:63). After talking to defendant and giving him some beer, Ms. Rodriguez had no contact with defendant the rest of the day (R. 119:45).

The morning of June 13, as Ms. Rodriguez and her friends prepared to run the river, they noticed defendant wandering around the camp area, but did not speak to him

(R. 119:45). When Ms. Rodriguez and her friends returned from their river trip later that day, Ms. Rodriguez's convertible Geo Tracker was gone. Also missing was a cooler containing all her and her friend's food, and many of the group's possessions, all of which they had previously removed from their vehicles and left in the camp, including a first aide kit, two camp stoves and seven bottles of propane fuel, twenty compact discs, twenty-one cassette tapes, a compact disc player, a compact disc/radio, and a radar detector (R. 119:46-49, 51-62, 66, 79). Parked in place of Ms. Rodriquez's Geo Tracker was the Geo Metro defendant claimed was his (R. 119:49). Ms. Rodriquez never gave defendant permission to use her car, her food, or any of her possessions, and never again heard from him (R. 119:47-48, 50-51, 61-62). Suspecting defendant had stolen her car and possessions, Ms. Rodriguez notified the police (R. 119:49-50; 51-61).

On June 16, Deputy Kim Neal of the Grand County Sheriff's Department discovered Ms. Rodriguez's Geo Tracker at mile post 10 on the Pot Ash road, seventy miles from Swayzee campground (R. 119:50, 82-83). The vehicle was parked in a campsite about fifty yards off the road, and when Deputy Neal approached he discovered defendant there also (R. 119:83-84). Deputy Neal also found the items taken from Ms. Rodriguez's campsite (R. 119:85-86).

Following his arrest and during his interview on June 16, defendant received and then waived his Miranda rights (R. 119:87). Defendant volunteered that he had come

from California and that he was without food or money (R. 119:87). After Ms. Rodriguez and her friends had gone rafting, he wandered into their campsite with the intention of taking some food, but when "the opportunity just presented itself" he took the vehicle, the food and items from the campsite, and some money (R. 119:87-88). In response to the officer's question about whether all of the camping equipment was "stolen," defendant said, "A lot of it is, but some of it is mine" (R. 119:88). At no point, either in this interview or in an interview on June 22, did defendant indicate that he intended to return the Geo Tracker to Ms. Rodriguez or that he knew where she lived (R. 119:91-93). Although Deputy Neal knew the Geo Metro had been listed as stolen (R. 119:89), he testified later that defendant claimed that he had borrowed the car from a friend (R. 119:103).

On June 22, Deputy Neal, with the aid of Deputy Steven White, again interviewed defendant (R. 119:92). When the officers informed defendant that the Geo Metro had been listed as stolen, defendant again stated that he had borrowed the car from a friend, but that "he had the vehicle a few more days than what he was supposed to have it" (R. 119:122).

Testimony Challenged as Hearsay[3]

Upon hearing Deputy Neal testify that on his first locating defendant with the Geo Tracker on June 16 he knew the Geo Metro was reported stolen (above), defense counsel objected on grounds of hearsay and moved for a mistrial (R. 119:89). The trial court sustained the objection and deferred consideration of the motion for mistrial for a brief time (R. 119:89, 95). During the court's consideration of defendant's motion, the prosecutor asserted that he expected Deputy White to testify that during his June 22 interview with defendant, defendant indicated that he "ke[pt the Geo Metro] longer than I was supposed to," in response to one of the deputies' stating that they knew that car was stolen (R. 119:102). Having already recognized the strength of the State's case (R. 119:100), the court stated:

> Okay, alright. Well, with that, that really constitutes an admission or at least could be considered as an admission that it was stolen and I think you have to elicit, you have to elicit the context for that admission, so I'm going to let you do that and I think it pretty much takes all of the sting out of what came in already. So, I'm certainly not going to grant a mistrial now.

(R: 119:102). Thereafter, Deputy Neal testified, without reference to his knowledge that the Geo Metro had been reported stolen, that defendant had told him on both June 16 and June 22 that he had only borrowed the Geo Metro (R. 119:103-04). Concerning

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[3] The transcript of all portions of the trial relating to defendant's hearsay challenge is attached at Addendum B.

the "borrowed" Geo Metro discussed in his June 22 with defendant, Deputy White testified:

> Q [Prosecutor]: What kind of vehicle was it?
>
> A [Deputy White]: It was a Geo Metro, I believe. He stated that he had borrowed it from a Magical Jeanne Poo, I believe was her name. We asked him if the vehicle had been stolen. He stated that it hadn't, that he had borrowed it from her. Upon the end of our interview, we did advise him that she had reported the vehicle as stolen and he stated that he had the vehicle a few more days than what he was supposed to have it.
>
> [Defendant]: I'm going to make a hearsay objection that I think we already have on the record.
>
> The Court: Objections overruled.

(R. 122).

Moments later, just before the close of evidence, the court gave the following cautionary instruction:

> [M]embers of the jury, with respect to the testimony that the defendant [sic] told that the Geo Metro was reported stolen. That's really hearsay. We really don't know what the owner of that vehicle would say if here testifying subject to cross examination. I am not allowing that in, so that you can determine whether that's true or not and the Metro is really not what this case is about. But it supplies meaning and a context for his answer, for his response, which was I guess I kept it longer than I was supposed to and that's the only purpose for which this is admissible.

(R. 125). The Court also admitted a general jury instruction that any evidence that has been admitted for a limited purpose should only be considered for that purpose (R. 91). The jury found defendant guilty on all counts (R. 100).

SUMMARY OF ARGUMENT

Defendant challenged as hearsay similar statements reported by two police deputies in connection with their interviews with defendant on June 16 and June 22. Since the trial court provided the relief defendant sought concerning the June 16 statement, defendant's challenge to this statement is moot. The court properly ruled that the June 22 statement was not introduced to prove the truth of the matter asserted. Rather, the statement was admitted to provide a context for defendant's admission that he had just "borrowed" for longer than agreed another car, which, in favor of the victim's car in this case, he later abandoned in circumstances rendering it impossible for its owner to find. Because evidence of defendant's guilt was compelling, and the court gave a detailed cautionary instruction, any error in admitting the deputy's testimony was harmless.

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED THE ALLEGED HEARSAY, BUT IN ANY CASE, ANY ERROR WAS HARMLESS BECAUSE EVIDENCE OF DEFENDANT'S GUILT WAS COMPELLING AND THE COURT ALSO GAVE APPROPRIATE CAUTIONARY INSTRUCTIONS

Throughout his brief, defendant consistently misconstrues the nature of the alleged hearsay at trial. Specifically, defendant challenges both deputies' references to the reportedly stolen Geo Metro as though they were the same and as though the trial court responded identically to each reference. Br. of App. 7-14. In fact, the trial court

sustained defendant's hearsay objection to Deputy Neal's reference to the Geo Metro in his June 16 interview.[4] Further, defendant attacks the trial court's ruling on Deputy White's June 22 reference to the reportedly stolen Geo Metro as a misapplication of exceptions to the hearsay rule under rules 803 and 804, Utah Rules of Evidence. Br. of App. at 8-13. However, the trial court denied defendant's objection to Deputy White's testimony on the ground that reference to the reportedly stolen Geo Metro was necessary to place in context the admission, unchallenged on appeal, that he had retained the Geo Metro longer than he was supposed to (R. 102, 125), a ruling which defendant barely challenges on appeal, see Br. of App. at 13, and which finds ample support in law. In any case, any error in allowing the challenged testimony for its limited purpose was harmless considering the strength of the evidence of defendant's guilt and the trial court's giving appropriate cautionary instructions.

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[4] Furthermore, the trial court explained at length to the parties, and Deputy Neal in particular, how the deputy's testimony, that on June 16 the Geo Metro had been reported stolen, was inadmissible hearsay (R. 119:96-100). In any case, because trial court sustained defendant's hearsay objection to Deputy Neal's reference to his June 16 interview with defendant, the issue is moot. See State v. Sims, 881 P.2d 840, 841 (Utah 1994) (describing mootness as when "the requested judicial relief cannot affect the rights of the litigants"); State v. Martinez, 925 P.2d 176, 177 (Utah App. 1996) (refusing to entertain arguments when the court "could not put defendant in a better position"). To the extent defendant's motion for mistrial survives, it is clearly fails based on the correctness of trial court's ruling and the harmlessness of any error, discussed below. See State v. Robertson, 932 P.2d 1219, 1230 (Utah 1997) (stating that a denial of a motion for a mistrial, in which the trial court determines whether an incident may have or probably influenced the jury to the prejudice of the defendant, is reviewed for abuse of discretion).

A. Reference to the Reportedly Stolen Geo Metro was Properly Admitted To Place in Context Defendant's Admission that he Borrowed the Metro Longer than He was Permitted.

On appeal, it is undisputed that defendant's statement that he had the car for longer than he had anticipated was properly admitted.[5] The only issue is whether Deputy White's statement that he had advised defendant that the car had been reported stolen constituted inadmissible hearsay. The lower court gave two distinct reasons for not considering this to be hearsay: (1) the statement was not introduced to prove the truth of the matter asserted (R. 119:125), and (2) this statement provided the context for an admission by defendant (R. 119:102).[6]

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[5]Under the Utah Rules of Evidence, "A statement is not hearsay if . . . [t]he statement is offered against the party and is . . . the party's own statement." Utah R. Evid. 801(d)(2)(A). Defendant acknowledges the admissibility of this portion of the deputies' testimony. Br. of App. at 13.

[6] While not advanced in the trial court, an alternative argument for admission of Deputy White's statement is that his assertion that the car had been reported stolen, followed by an affirmative response by defendant, could be considered an adopted assertion. See Utah R. Evid. 801(d)(2)(B) ("A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement of which the party has manifested an adoption or belief in its truth"); State v. Carlsen, 638 P.2d 512, 514 (Utah 1981) (finding an adopted admission when "defendant made no attempt to contradict [the] words. By this conduct, defendant authorized and adopted [the] statements and they are admissible against defendant as a party to the case"), cert. denied, 455 U.S. 958 (1982). This Court "may affirm the trial court's ruling on any proper ground as long as there is evidence in the record supporting such an affirmance." State v. Montoya, 937 P.2d 145, 149 (Utah App. 1997). See also Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 894-95 (Utah 1988) (appellate court may affirm trial court on any proper ground, even though the trial court assigned another reason for its ruling).

It is well settled that for statements to be hearsay, they must "offered into evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c). Statements of a declarant not testifying at trial are often admitted into evidence not to prove the truth of the matter asserted, but to show the influence of the statements on defendant's behavior, State v. Salmon, 612 P.2d 336, 369 (Utah 1980); the chronology of events leading to specific incidents at issue, State v. Morgan, 813 P.2d 1207, 1211 (Utah App. 1991); the setting in which police confronted the defendant, State v. Collier, 736 P.2d 231, 234 (Utah 1987); and the circumstances explaining a police officer's motive in accusing a defendant of a particular crime, Layton City v. Noon, 736 P.2d 1035, 1039 (Utah App. 1987). See also State v. Ninci, 936 P.2d 1364, (Kan. 1997) (statements admissible to explain context of defendant's responses).

In this case, testimony elicited from Deputy White was not offered to prove that the Geo Metro had been stolen, and in fact, the stolen nature of the vehicle was immaterial to the case. Instead, the statement was proffered to put defendant's admissible statement that "he had the vehicle longer than he expected" into context. (R. 119:104-05). Indeed, the state "was not trying to prove whether [defendant] stole the car . . . . Thus, the truth or falsity of [the] statements is immaterial. Therefore, . . . these statements were not hearsay." Perez, 924 P.2d at 3.

B. Because Evidence of Defendant's Guilt was Compelling and the Trial Court Gave the Jury Appropriate Cautionary Instructions, Any Error in Admitting Deputy White's Testimony that the Geo Metro had been Reported Stolen was Harmless.

Defendant asserts that the "hearsay evidence erroneously admitted is the only 'convincing' piece of evidence admitted to show [defendant]'s intent to do anything but eventually return [Rodriguez]'s car and belongings." Br. of App. at 13-14.

"Erroneous admission of evidence is harmless if there is convincing properly admitted evidence of all essential elements of the case." State v. Bruce, 779 P.2d 646, 656 (Utah 1989). Moreover, courts "'may not interfere with a jury verdict unless upon review of the entire record there emerges error of sufficient severity to indicate that defendant's rights were prejudiced in a substantial manner.'" Perez, 924 at 3 (quoting Salmon, 612 P.2d at 370); see also State v. Diaz, 859 P.2d 19, 23 (Utah App. 1993) (courts will not reverse a trial court's decision to admit evidence unless a substantial right has been affected).

Defendant allegedly drove to the Swayze Rapids Campground from California in a borrowed Geo Metro carrying Florida license plates (R. 119:49, 87). When he took Ms. Rodriguez's Geo Tracker, he left the Geo Metro, which he claimed was his, in its place (R. 119:49). Defendant was found camping in a remote place three days later (R. 119:82-84). It is evident from defendant's admission, that he had "borrowed" the car from its owner longer than he expected (R. 122), that defendant had not informed the

owner of the Geo Metro of its whereabouts, and plainly the owner would not have soon recovered the car, if at all. Thus, while the trial court recognized that testimony that the Geo Metro had been reported stolen, per se, was inadmissible hearsay, it is inevitable that the jury would have construed defendant's immediate admission as strong evidence that, indeed, he had stolen that car.

Moreover, "convincing, properly admitted evidence" existed to support the conviction of theft. Since defendant only challenges his conviction as to the degree of the offense (theft v. joy riding), see Br. of App. at 4, only defendant's intent to permanently deprive the owner of the vehicle is at issue.[7] At trial, the State proved beyond a reasonable doubt defendant's desire to permanently deprive Rodriguez of the vehicle:

- Rodriguez testified that defendant had taken her vehicle without her permission or knowledge (R. 119:48, 61), and thus it could be inferred that defendant intended to deprive her of possession. See State v. Chesnut, 621 P.2d 1228, 1231 (Utah 1980);

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[7] Utah Code Ann. § 76-6-404 (1995) provides: "A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Relevant to the facts of this case, the jury instructions correctly summarized the statutory definition of a "purpose to deprive":

> Purpose to deprive means to have the conscious object 1) to withhold property permanently or for so extended a period or use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or 2) to dispose of the property under circumstances that make it highly unlikely that the owner will recover it.

(R. 82). See Utah Code Ann. § 76-6-401(3) (1995) (defining purpose to deprive). See also State v. Laine, 618 P.2d 33,36 (Utah 1980); State v. Daniels, 584 P.2d 880, 884 (Utah 1978); State v. Cornish, 568 P.2d 360, 361 (Utah 1977).

- Defendant's abandonment of the "borrowed" Geo Metro at Ms. Rodriguez's campsite without any gas (R. 119:87, 111), rather than returning it to its owner, supports the inference that defendant would dispose of her Geo Tracker similarly;

- Defendant, out of food and money, took consumables (food and fuel for stoves), along with a substantial cache of stereo equipment from Ms. Rodriguez's campsite, items he nowhere suggests he would have returned (R. 119:51-61, 63, 66, 87);

- Defendant possessed the car from June 13 until June 16 (R. 119: 50, 82-83);

- Ms. Rodriguez only planned to be at the campsite until June 14, but by June 16 defendant had made no attempt to return the vehicle and did not indicate that he knew where the victim lived (R. 119:66, 91-93), making it "only a possibility that [the victim] would have recovered [the] stolen automobile." State v. Daniels, 584 P.2d 880, 883 (Utah 1978);

- Defendant traveled seventy miles from where he originally stole the car (R. 119:83), and was located fifty yards off the road in a remote campsite (R. 119:82-83). See Utah Code Ann. § 76-6-401(3) (c) (1995) (defining purpose to deprive as "to dispose of the property under circumstances that make it likely that the owner will recover it");

- Defendant's statement that he kept the Metro longer than he expected, would allow the jury to infer that defendant habitually steals (R. 119: 104-05);

- Apart from the alleged hearsay testimony, other factors suggested that defendant had stolen the Geo Metro, such as the fact that he claimed to be from California, the Metro had Florida license plates, and defendant had identification from Texas (R. 119:49, 84). Also, when asked if defendant had told Rodriguez that the vehicle he was driving was a friend's car, she testified that he had claimed ownership of it (R. 119:64, 80).

Moreover, contrary to defendant's assertion on appeal, see Br. of App. at 12 n.1, the trial court gave a detailed cautionary instruction which notified the jury that

reports that the Geo Metro was stolen was hearsay, that it had been stricken as evidence that the car actually was stolen, and that those remarks only provided a context for defendant's claim that the car was borrowed (R. 119:125).[8] See State v. Harmon, 956 P.2d 262, 272-73 (Utah 1998) (recognizing the utility of curative instructions in mitigating trial court error).

In sum, based on the compelling evidence supporting defendant's intent to permanently deprive owners of their property, and the trial court's properly instructing on how to consider the deputies' challenged remarks, any error in admitting Deputy White's challenged testimony does not undermine confidence in the verdict. State v. Knight, 734 P.2d 913, 920 (Utah 1987).

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[8] Defendant asserts that

> [a]lthough the objection to Officer Neil's [sic] earlier testimony that the car had been stolen was sustained, no curative language was afforded the defendant as the Court determined that it was appropriate to allow in this testimony. Accordingly, the jury received from two law enforcement officers testimony that the car [defendant] was driving, was also stolen.

App.Brief at 12 n.1.

This statement mischaracterizes the record. First, in considering defendant's motion for mistrial shortly after Deputy Neal's testimony, the court offered, and defendant declined, a curative instruction (R. 119:100-01). Thereafter, following defendant's objection to Deputy White's testimony, the trial court gave a detailed cautionary instruction (R. 119:125) without objection from defendant. Later, defendant expressly acquiesced in the trial court's instruction directing the jury to disregard excluded evidence and to consider evidence for only a limited purpose where so directed by the court (R. 119:134; Jury instruction #13, R. 9, attached at Addendum C). See Harmon, 956 P.2d at 273 n.9 (expressing confidence in jury's ability to follow court's instructions) (citations omitted). Indeed, defendant's assertion of trial court oversight in the face of his explicit acquiescence constitutes invited error. See State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993) ("a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error") (citations omitted); State v. Medina, 738 P.2d 1021, 1023 (Utah 1987) (court refused to consider manifest injustice exception where defense counsel stated she had no objection to the instruction).

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's conviction be affirmed.

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Because this case presents no complex or novel questions, the State does not request that it be set for oral argument or that a published opinion issue.

RESPECTFULLY SUBMITTED this 3rd day of May, 1999.

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KENNETH A. BRONSTON
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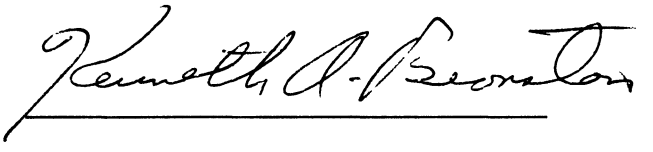
CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Happy J. Morgan, attorney for appellant, Grand County Public Defender, 8 South 100 East, Moab, Utah 84532, this 3rd day of May, 1999.



ADDENDA

ADDENDUM A

76-6-401. Definitions.

For the purposes of this part:

(1) "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

(4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

(5) "Deception" occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or

(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or

(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official record; or

(e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

76-6-404. Theft — Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

76-6-412. Theft — Classification of offenses — Action for treble damages.

(1) Theft of property and services as provided in this chapter shall be punishable:

(a) as a felony of the second degree if the:

(i) value of the property or services is or exceeds $5,000;

(ii) property stolen is a firearm or an operable motor vehicle;

(iii) actor is armed with a dangerous weapon, as defined in Section 76-1-601, at the time of the theft; or

(iv) property is stolen from the person of another;

(b) as a felony of the third degree if:

(i) the value of the property or services is or exceeds $1,000 but is less than $5,000;

(ii) the actor has been twice before convicted of theft, any robbery, or any burglary with intent to commit theft; or

(iii) in a case not amounting to a second-degree felony, the property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, poultry, or a fur-bearing animal raised for commercial purposes;

(c) as a class A misdemeanor if the value of the property stolen is or exceeds $300 but is less than $1,000; or

(d) as a class B misdemeanor if the value of the property stolen is less than $300.

(2) Any person who violates Subsection 76-6-408(1) or Section 76-6-413, or commits theft of property described in Subsection 76-6-412(1)(b)(iii), is civilly liable for three times the amount of actual damages, if any sustained by the plaintiff, and for costs of suit and reasonable attorneys' fees.

Rule 801. Definitions.

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if:

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ADDENDUM B

evidence shed.

Q Did he ever make any claim of owning a radar detector?

A I didn't ask him about a radar detector. He didn't say.

Q You just don't recall the radar detector one way or the other?

A I don't recall a radar detector.

Q Did he tell you anything else in that conversation?

A Well, on the occasion that Ms. Rodriguez's car was stolen, the vehicle that was left on the scene where her's is, was also listed as a stolen vehicle.

Q Did he tell you that or did you already knew that?

A We knew that.

MR. SCHULTZ: Objection, your honor, move to strike.

THE COURT: Sustained.

MR. SCHULTZ: (inaudible) I now move to a mistrial.

THE COURT: Well, I'll address that later.

Q Did you talk to him about anything else on that particular day, the day that you arrested hi m?

A Yes we did.

Q What else?

A I asked him about the other vehicle he had, where

original list, like numbers 10, 11, 16, 19, 42, and 43?

A They were on the original inventory list, but I hadn't checked them when I talked to her regarding what property was hers.

Q And you don't, you didn't check them off when you talked to her on the phone, but you don't have any knowledge whether later that night or that day when you came to pick the items up, she picked them up or not?

A Correct.

Q Because you weren't here?

A No.

Q That's all I have.

THE COURT: I think I'm going to consider your motion before we proceed with your cross examination. Members of the jury I'm going to excuse you from the courtroom for a few minutes, while I discuss something with the attorney's and I don't think it will be more than a few minutes, so we'll have you come back before the noon recess. Be advised while you're outside the courtroom, don't discuss this case amongst yourselves. Don't allow anyone to discuss it in your presence, don't make up your mind as to any issue until it's finally submitted to you. Okay. The issue we need, the record will show the court's in session outside the hearing of the jury. The issue we have is whether the

conversation that the defendant had with the police about the Metro is admissible or not and if its inadmissable, then what should be the consequence of what was (inaudible) having come in. You did talk to him about the Metro?

KIM NEAL: Yes I did.

THE COURT: And he told you that it was stolen, is that right?

KIM NEAL: It was listed as stolen and I knew it had been listed as stolen.

THE COURT: What did he tell you about it?

KIM NEAL: He said he had borrowed it from a friend.

MR. SCHULTZ: And that's what he testified, in his testimony, when you said that he told you it was stolen, that's not what he testified.

THE COURT: Right. So the defendant claims that he borrowed it from a friend, but you knew that it was listed stolen?

KIM NEAL: Yes.

THE COURT: There's no dispute that the fact that it was listed as stolen is hearsay, and is therefore admissible.

MR. BENGE: Correct, your Honor. And I guess I would say first of all, I didn't elicit that testimony. Number two, Mr. Schultz did bring up the issue with Ms. Rodriguez that that vehicle was there and was still there at the time

she left and third there's been no motions in limiting file of this matter and this was a matter that innocently came up.

THE COURT: Okay. I actually think that the jury is entitled to hear any admissible evidence that would explain to them why it is he left the Metro there, because I fully expect Mr. Schultz to point out to the jury, look he intended to bring it back, he left his car there. The fact that it was listed as stolen is not however admissible, so that should not have come in.

MR. SCHULTZ: I guess I have some concerns as to whether or not its (inaudible) or not. I mean, I don't have any (inaudible), but I guess I have some concerns to how innocent it is from the officer, I mean, I don't challenge the fact that the defense, you know, was in the camp for too long of a time, but I don't have to disclose my strategies in this and that and I have a lot of burdens that the State has to carry and presumptions in my favor, but in this particular case, I already have disclosed my strategy and that is that we're going for a lesser offense, that this was a joy ride thing and I think that the officer may have gotten some presumption of that as well as from my questioning, and that answer was not really a response to the question that was asked. I mean, it was kind of

spontaneous and that's what my concern was in my objection. I think the court should inquire to why that response was given, find out how that came up. It wasn't something I could have made an object to before.

KIM NEAL: The question was asked what we talked about and what I asked the subject on the ride into town and that was one of the things I asked him.

THE COURT: Okay. What did you ask him on the ride into town?

KIM NEAL: I asked him about the Geo Metro, where it came from, who it belonged to, how he was in possession of it.

THE COURT: You see, that's all fine. But what you knew from another source is not, because that's hearsay, you see. When somebody tells you something and intending to assert that it's true, okay, sometimes we just, we just let people know about things, but sometimes, what matters is that we told them or we said, but in this case what matters is whether it's true that it's stolen or not and that was someone, the person that knows that that other vehicle was stolen is somewhere else, and of course, the defendant knows, I mean, he didn't admit it, so if the defendant admitted, he had admitted to you that it was stolen, that's fine. But bringing in that somebody else told you that,

that's not fine. You're conservation with him, that's fine, except if you say to him, well this is reported stolen, of course, then that introduces someone else's hearsay statement. Well, I don't like it.

MR. SCHULTZ: I just want to make one additional thing judge and I guess, I don't know how much knowledge or whatever the client knows is impudent to me, but I would indicate as far as it goes, that's a surprise to me. I mean I have reviewed the tape that was given to me, I'm familiar with the interview that Deputy Neal has testified about and the information I have at this time is that it was borrowed from a friend, this magical or something.

MR. BENGE: On the tape, they informed him that that vehicle was stolen and that vehicle was recovered by the sheriff's office and has been turned over to its owner. I guess, I would even want to inquire into that, if the court will let me.

THE COURT: If the sheriff's office went to the defendant and said, "Hey, we're going to turn this over to so and so, do you have any objection to that," he says, and its somebody different than who he says he borrowed it from and he didn't object, that's fine. We're going to have to keep this narrowed down though, to what we may be considered admissions. Yeah, the fact that it was turned over, would

be relevant if the defendant, if you have evidence that the defendant was informed that it would be turned over and that it would be turned over to someone different, because you would expect him to say, "Hey, don't do that, it belongs to my friend."

MR. BENGE: Well, no it was turned over to the person he said he borrowed it from.

THE COURT: Great, if you had the person that he said he borrowed it from here, then I'd let it in, because it would explain why it is he left it there, why he didn't care about leaving it there, but unfortunately you've got a valid hearsay objection on that, so I'm going to have to cut that off and I think the, if you still want to introduce the fact that he claimed that he had borrowed it as helping to explain why it is he didn't, it didn't bother him to leave it there, I'll let you do that. In fact, I've got a question from a juror about it. Did Deputy Kim Neal have any conversation with the defendant regarding the Geo Metro? Don't ask this if it will cause mistrial. And it wouldn't cause mistrial to ask that question, I don't think, as long as Deputy Neal knows he's just supposed to talk about what the defendant admitted. Okay. Now, I think the evidence in this case is pretty strong and I don't think this is going to make a big difference, I don't think it's going to make a

difference in the outcome of this trial that this slipped in. And I can give (inaudible) instruction if the defense wants me to that the jury is not to consider anything that may have slipped out about this being stolen, simply to take it that the only thing they know about it is the defendant claims, the defendant stated that he had borrowed it from a friend.

MR. SCHULTZ: I don't want to make the decision at this time, you honor. I certainly, I think when we're discussing jury instructions we can get to that point.

THE COURT: Okay, you don't want an instruction now, anyway?

MR. SCHULTZ: Yeah and I wouldn't want it (inaudible), you know, I think that anything that is sustained an objection to is answered (inaudible).

MR. BENGE: Your Honor, before we bring the jury in, I kind of curtailed my questioning in that regards as soon as Mr. Schultz made his motion for mistrial. I'd like leave to reopen my . . .

THE COURT: And you want to ask about what the defendant said.

MR. BENGE: Said about that vehicle, both on the 16th interview and then also the one on the 22nd.

THE COURT: Okay, you can do that. Mr. Neal, be clear

that I want you to understand, don't talk about what anybody told you.

MR. BENGE: However, let me just sort of tell you what I'm going to say before, in case Mr. Schultz wants to head me off at the pass to avoid a problem. I'm going to ask him about the interview on the 22nd and ask him if anything was stated about that Geo Metro and I believe that he'll probably say that the defendant said he had borrowed it about a friend and then either Mr. White or Mr. Neal, I can't remember which from the tape, said, "Well, we have indication it was stolen," to which the defendant replied, "Well, I guess I did keep it longer than I was supposed to."

THE COURT: Okay, alright. Well, with that, that really constitutes an admission or at least could be considered as an admission that it was stolen and I think you have to elicit, you have to elicit the context for that admission, so I'm going to let you do that and I think it pretty much takes all of the sting out of what came in already. So, I'm certainly not going to grant a mistrial now.

MR. BENGE: Thank you, your Honor.

THE COURT: Bring the jury back in. Record will show members of the jury are present. Mr. Benge, you may proceed with your, I'm going to allow Mr. Benge to reopen his examination.

Q Kim, did you have any conservation, either with the defendant on the 16th or on the 22nd times you interviewed him about the Geo Metro that he had been driving earlier.

A Yes, I did.

Q During which discussion or both?

A Actually, I discussed it with him both times.

Q Tell us what was the nature of the discussion on the 16th and then also on the 22nd. What was on the 16th.

A The nature of that discussion, how had he come in control of the Geo Metro that was left at the scene out at Swayze Beach.

Q What did he say?

A He advised me at that time he had borrowed it from a friend.

Q Was that the total extent of your conservation about that on that day?

A I believe he gave me the name of the friend.

Q And what was that name?

A If I can remember correctly it back, he said it was Magical Jeneane Poof, I believe is the name and we kind of kidded about what her name was.

Q Did you discuss that vehicle anymore that day?

A No.

Q Did you discuss that vehicle in your interview with the defendant on the 22nd of June?

A I believe Detective Steve White did, yes.

Q Were you present?

A Yes, I was.

Q What was the nature of that discussion?

A During the interview, the Geo Metro was brought up again by Detective Steve White as to how he had obtained possession of that, what he planned on doing with the car, how long he had had it.

Q What did he say?

A He stated he had borrowed it from a friend he knew in California.

Q Is that was said by whom?

A I really can't recollect what Detective White asked him regarding (inaudible), from Detective White.

Q What did the defendant?

THE COURT: Speak up.

A I'm sorry. I have a tendency to get lower and lower as I talk.

Q In response to whatever to Mr. White said, what did the defendant say?

A I believe he said he had had the vehicle longer than he expected.

Q He had the vehicle longer than he expected?

A To keep, I guess.

Q Do you know what was done with that vehicle?

A At the time Ms. Rodriguez contacted Emery County and reported her vehicle stolen, one of our officers went there and I believe the Emery County had the vehicle towed to their sheriff's office there in Emery County and they went and examined the vehicle at that time. I think contact was made with the owner and they came and picked up, but I had nothing to do with that part of the investigation.

Q That's all I have, Kim.

THE COURT: Mr. Schultz.

CROSS EXAMINATION

BY MR. SCHULTZ:

Q The owner was the individual that Mr. Miller told you, yes?

A Yes.

Q And was there any explanation for why this, was the friend that he borrowed it from from California?

A From talking with Mr. Miller, I would say yes, she lives in California.

Q Is there any explanation from why the California resident had Florida plates on her car?

A I believe Mr. Miller stated that she had just

been in prior to this one. He said it had been borrowed from an individual.

Q What kind of a vehicle was it?

A It was a Geo Metro, I believe. He stated that he had borrowed it from a Magical Jeanne Poo, I believe was her name. We asked him if the vehicle had been stolen. He stated that it hadn't, that he had borrowed it from her. Upon the end of our interview, we did advise him that she had reported the vehicle as stolen and he stated that he had the vehicle a few more days than what he was supposed to have it.

MR. SCHULTZ: I'm going to make a hearsay objection that I think we already have on record.

THE COURT: Objections overruled.

Q Was that the extent of the interview or the major, the high points of the interview?

A Yes sir.

Q Did you tape record that interview?

A Yes sir, I did.

Q On what kind of a tape machine did you tape record?

A It was on just a little pocket micro.

Q Do you have the micro cassette of that interview with you?

A Yes sir, I do. Right here.

Q Also, did you have occasion to try and transcribe that micro cassette to a larger format that would be, perhaps, easier to hear.

A Yes sir I did. It's right here.

Q Is this an exact duplicate of the . . . ?

A Yes sir it is.

Q Direct your attention to State's Exhibit 2, is the original micro cassette of your interview with Mr. Miller?

A Yes sir it is.

Q And with regard to Exhibit 3, is this the exact dub of that onto a larger cassette?

A Yes, sir.

Q I'd offer Exhibit's 2 and 3. I don't know, with regard to that, I don't necessarily want to play it to the jury right now. I would ask that the jury take them into the jury room and listen to them on their leisure, on either of the machines. We have brought two machines. The little machine is not, the volume isn't very loud. The larger dub version has a lot of static, but it's listenable, but I think either of them would be more listenable in the jury room than in the court.

THE COURT: Okay.

MR. SCHULTZ: Can I have voir dire?

THE COURT: Yes.

MR. SCHULTZ: Deputy, Exhibit 2, that's the tape that you made?

DEPUTY WHITE: Yes, sir, the copy.

MR. SCHULTZ: It's been in your possession, when, since the time it was made?

DEPUTY WHITE: Yes sir it has.

MR. SCHULTZ: And did you review it in the last couple of days?

DEPUTY WHITE: Yes sir. I reviewed it this morning after it was made.

MR. SCHULTZ: And is it complete?

DEPUTY WHITE: Yes sir.

MR. SCHULTZ: As the entire interview?

DEPUTY WHITE: Yes sir.

MR. SCHULTZ: Nothing's been added, nothings been deleted?

DEPUTY WHITE: No sir.

MR. SCHULTZ: Is this the copy tape that you brought on Wednesday?

DEPUTY WHITE: Pardon? The tape that you have is the micro?

MR. SCHULTZ: Right.

DEPUTY WHITE: I believe then, yes. This bigger tape

was made directly from it.

MR. SCHULTZ: You made Exhibit 3?

DEPUTY WHITE: What's that?

MR. SCHULTZ: And you made Exhibit 3 yourself?

DEPUTY WHITE: Yes sir, myself and Sergeant Isaiah helped me put everything.

MR. SCHULTZ: I have no objection to 2 or 3.

THE COURT: Exhibit's 2 and 3 are received. The members of the jury, with respect to the testimony that the defendant told that the Geo Metro was reported stolen. That's really hearsay. We really don't know what the owner of that vehicle would say if here testifying subject to cross examination. I am not allowing that in, so that you can determine whether that's true or not and the Metro is really not what this case is about. But it supplies meaning and a context for his answer, for his response, which was I guess I kept it longer than I was supposed to and that's the only purpose for which this is admissible. Okay. You can cross examine this witness Mr. Schultz.

CROSS EXAMINATION

BY MR. SCHULTZ:

Q Thank you, your Honor. Deputy, there's, after you got Mr. Miller on the, have you had any contact with Mr. Miller on this taped interview?

ADDENDUM C

INSTRUCTION NO. 13

I have decided what evidence should be admitted and for what purpose. Where I have excluded evidence or ordered you to disregard it, please do so. Where I have limited the purpose for which evidence may be considered, you are expected to follow my instruction.